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No. 408. October Term, 1903.

The Supreme Court U. S.
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Supreme Court of the United States.

The Interstate Commerce Commission, Appellant,

vs.

David G. Baird, Fred. F. Chambers, *et al.*, Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF DAVID G. BAIRD AND EBEN B. THOMAS, APPELLEES.

FRANCIS L. GOWEN,
F. H. JANVIER,
JOHN G. JOHNSON,
For Appellees.

Allen, Lane & Scott, Pr., Phila.

IN THE SUPREME COURT OF THE UNITED STATES.

The Interstate Commerce Commission, Appellant,

vs.

David G. Baird, Fred F. Chamber, George O. Waterman et al.

October Term, 1903.

No. 409.

BRIEF ON BEHALF OF DAVID G. BAIRD AND EBEN B. THOMAS, APPELLEES.

STATEMENT OF THE CASE.

In this proceeding, instituted by the Interstate Commerce Commission in the Circuit Court of the United States for the Southern District of New York, an order was sought which should compel the production of certain documents and answers to certain questions, deemed by the Commission to be material to the issues in a certain proceeding pending before it in which William R. Hearst was complainant and certain railroad companies, defendants.

The appellees herein and the respondents in the proceeding below were witnesses who had declined, under instruction of counsel, to produce the documents called for or to answer the questions propounded to them.

The case was heard upon petition and answer, and the orders prayed for were denied.

In the Commission's petition presented to the Circuit Court the following averment is made as to the character

and scope of the proceedings pending before it (Record, pages 37 and 38):—

> "That when the said witnesses refused to answer said questions, your petitioner was engaged, as aforesaid, at room 70, in the Post Office Building, New York City, in the State of New York, in the discharge of its duty to execute and enforce the provisions of said Act to regulate commerce, and in the exercise of its authority to inquire into the management of the business of common carriers, subject to the provisions of said Act, and to keep itself informed as to the manner and method in which said business is conducted, and to obtain from said common carriers full and complete information necessary to enable it to peform the duties and carry out the objects for which it was created; and your petitioner is of the opinion that the said questions are not only relevant and material to the issues on trial in said proceeding, but answers thereto are necessary in order to enable your petitioner to discharge its duty and execute and enforce the provisions of said Act to regulate commerce and to inform your petitioner as to the manner in which the business of said common carriers is conducted, and to enable your petitioner to obtain the full and complete information necessary to enable your petitioner to perform the duties and carry out the objects for which it was created."

The answer of the respondents denied that such was the character of the proceeding, such denial being made by the respondent, Baird, in the form following (Record, page 209):—

> "This respondent denies the averments of said petition that at the time he declined to produce said contracts the said Interstate Commerce Commission was engaged in an inquiry into the management of the business of the common carriers, defendants in

said proceeding, in order that it might keep itself informed as to the manner and method in which said business was conducted, and might obtain from such common carriers full and complete information necessary to enable it to perform such duty.

"He avers, on the contrary, that said Commission was engaged in the hearing of testimony on behalf of the complainant in a certain proceeding pending before said Commission, instituted by William Randolph Hearst, and that the only matters under investigation were the particular allegations made by the said William Randolph Hearst in his petition as to certain alleged unlawful practices of the defendants herein."

The same averment substantially was made by the respondent, Thomas, in his answer. (See Record, page 93.)

Judge Lacombe's ruling as to this contention was as follows (Record, page 833):—

"Among the objections advanced to the granting of this petition it is contended that the Interstate Commerce Commission has no jurisdiction to hear the complaint, for the reason that the complainant is not himself a shipper of coal. It was contended, in opposition, that the Commission is conducting a general investigation into the conduct of the business of transportation by the defendant carriers, which it has a right to do under the statutes independent of any complaint by a person aggrieved. The record, however, does not sustain this proposition. The proceeding before the Commission was begun by the service of a formal verified complaint, to which separate answers were interposed by the several defendants; the petition presented to this court avers that the refusals to produce documents and answer questions took place in the course of a 'hearing upon said complaint' which the Commission had duly ordered; the prosecution of the complaint before the Commission is being conducted—as it is most ap-

propriate that such prosecution should be—by the counsel for the complainant."

The issues raised in the proceeding before the Commission were, as summarized by Judge Lacombe, as follows (Record, page 832):—

> "It appears from the record that William R. Hearst heretofore duly filed a petition and complaint against the defendants, alleging—
>
> "1. That the freight rates charged by them for the transportation of anthracite coal are unreasonable and unjust.
>
> "2. That said rates are relatively unreasonable and unjust as compared with the rates charged for transportation of bituminous coal and with the rates for other carload freight generally.
>
> "3. That defendants have combined to pool and divide among themselves freights and freight traffic of anthracite coal; and
>
> "4. That they have discriminated against private operators of coal mines by charging them a higher rate of freight than charged other private operators or coal companies owned by said defendants; all in violation of the Interstate Commerce Act."

To sustain these contentions, complainant called a large number of witnesses, among others, E. B. Thomas and David G. Baird, the president and secretary, respectively, of the Lehigh Valley Coal Company.

The corporate organization of the Lehigh Valley Coal Company and its relation to the Lehigh Valley Railroad Company is as set forth in the answer of the witness Baird (Record, pages 210, 211):—

> "The Lehigh Valley Coal Company, whose contracts this respondent was directed to produce, is a corporation created by and existing under the laws of the Commonwealth of Pennsylvania. It was organized March 4th, 1875, by merger and consolidation of the Luzerne Coal and Iron Company and the

Green Land Company, corporations created by and existing under the laws of the Commonwealth of Pennsylvania, and has a capital stock of $1,000,000 and an outstanding bonded indebtedness of $19,970,000.

"Under and by virtue of the express authority conferred by the statutes of the Commonwealth of Pennsylvania the Lehigh Valley Railroad Company acquired and holds all its stock, but such acquisition and holding imposes upon said Lehigh Valley Railroad Company no greater responsibility for the acts of said Lehigh Valley Coal Company than is imposed upon or exists in the case of stockholders in corporations generally.

"The said Lehigh Valley Coal Company, by its charter, is authorized to, and has since its organization engaged in the business of mining, purchasing, and selling coal. Its business is wholly dissociated from that of transportation."

Having no connection with the transportation of coal, this company had not been made a party defendant in the proceeding before the Commission.

The testimony sought to be elicited from the two witnesses Thomas and Baird related exclusively to the terms upon which the Lehigh Valley Coal Company purchased certain coal and the methods pursued by it in connection with the sale and disposition of its product. David G. Baird, its secretary, had been subpœnaed to produce certain contracts. By agreement of counsel he was excused from actual attendance before the Commission, under a stipulation, however, that the right of the Commission to enforce production of the contracts called for should be the same as if he had attended, and under advice of counsel had declined to produce them. The proceedings before the Commission leading up to the refusal to produce the contracts called for were as follows (Record, pages 297, 298):—

"Mr. Shearn:—I ask the Commission to direct the counsel to produce the contracts called for.

"THE CHAIRMAN:—As to certain contracts described in this subpœna, counsel replied that there are no such contracts.

"MR. SHEARN:—I ask the court to direct counsel to produce the contracts between the Lehigh Valley Coal Company and the owners of anthracite coal mines. entered into between January 1st, 1901, covering the purchase or transportation of anthracite coal.

"MR. FIFER:—On whom was the subpœna served—on counsel?

"MR. SHEARN:—No, sir; on the president and secretary. You can see (concede) the subpœnas were properly served.

"MR. GOWEN:—Yes, sir.

"MR. SHEARN:—They were served on the president and secretary of the railroad company and on the president and secretary of the coal company.

"MR. GOWEN:—My agreement yesterday with Mr. Shearn was that Mr. Baird, on whom the subpœna was served, should not attend, but that Mr. Shearn should not lose anything.

"THE CHAIRMAN:—I understand counsel to say that there was no such contract as described.

"MR. SHEARN:—He does not say that there are none for the purpose (purchase) of coal, but declines to produce them. I ask that they be produced.

"THE CHAIRMAN:—You make a distinction, therefore, between contracts for the purchase of coal and the sale of coal?

"MR. SHEARN:—I accept for the present counsel's statement that there are no contracts for the transportation of anthracite coal entered into by the Lehigh Valley Railroad Company since January 1st, 1901, but there are contracts for the purchase of anthracite coal entered into by the Lehigh Valley since January 1st, 1901. These are between the Lehigh Valley Coal Company and the owners of mines for the purchase of coal since January 1st, 1901, and

properly described in the subpœna, and I ask the court to make an order directing that they be produced.

"THE CHAIRMAN:—You claim that those contracts provide for the payment of a certain percentage of the price at tidewater?

"MR. SHEARN:—Yes, sir. I would like—if you wish to consider that—to hand up to you the copy of one of these contracts.

"MR. KERR:—Let us confer a moment in regard to it. I think we will be willing to submit one of the contracts to the Commission, not as evidence, but for them to see the terms of the contract, in order that we may discuss the question involved in this matter here.

"COMMISSIONER PROUTY:—Are the contracts substantially the same?

"MR. KERR:—They are substantially the same, not in all details, but in their general provisions. We will have no objections, I think, to the Commission having one of them to examine. * * *

"THE CHAIRMAN:—We will take the matter under consideration and take a recess now until two o'clock.

"THE CHAIRMAN:—During the recess the Commission has briefly examined the blank contract which was submitted to our inspection by the courtesy of counsel. We understand from counsel that all the stock of the Lehigh Valley Coal Company which is denominated the buyer in this contract, is owned by the Lehigh Valley Railroad Company, and it appears from an inspection of the contract that the prices paid to the seller are certain percentages for which the coal is sold at tidewater terminals. If the balance retained is less than the amount paid the railroad company, the coal company sustains a loss in the transaction, which is hardly to be assumed. However this may be, the facts alleged to be contained in these contracts may properly be shown, we think, and we also think that the contracts are com-

petent evidence of the facts. We therefore overrule the objection and allow the contracts to be put in evidence."

The legal effect of these contracts is thus stated by Judge Lacombe: "It is entirely a contract of purchase, and does not deal at all with the subject of transportation. It fixes the price which the Lehigh Valley Coal Company is to pay the seller for coal at a certain percentage of the price at which coal of the same quality and sizes shall be sold during the month at a specified place. It is in no way different from a contract for the purchase of a specified number of tons of coal at a specified sum in dollars and cents, a contract made in the State of Pennsylvania and to be completed therein by the delivery of coal at the breaker."

Eben B. Thomas, the president of the Lehigh Valley Coal Company, was interrogated as to a great variety of matters. His testimony will be found on pages 591-632 of the Record. The questions which he declined to answer were three in number, and were as follows:—

"Bearing in mind your testimony that you do not believe in reckless competition, do you also conduct the business of selling in accordance with those same ideas, so as to avoid what you regard as reckless competition?

"Who fixed the price of the coal of the Hillside Valley Coal Company that is sold at tidewater?

"Who fixed the price of the coal of the Hillside Coal and Iron Company and the Pennsylvania Coal Company that was sold at tidewater during your connection with those properties?"

BRIEF OF ARGUMENT.

Section 12 of the Act to Regulate Commerce, which furnishes the basis for this proceeding, provides a method for enforcing attendance of witnesses and production of

books and papers in proceedings before the Interstate Commerce Commission. The method to be pursued is thus defined by the section:—

> "Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpœna the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.
>
> "And any of the Circuits Courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any common carrier subject to the provisions of this Act, or other person, issue an order requiring such common carrier, or other person, to appear before said Commission (and produce books and papers if so ordered), and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

The authority of the court is to be exerted in order that evidence "*touching the matter in question*" may be forthcoming. The court, by the express enactment of the section is to issue an order, not, it will be observed, to produce books called for by the Commission or answer the questions propounded by it or by it ordered to be answered, but to produce books and give evidence "touching the matter in question."

The power of the court would seem, therefore, to be limited by the express language of the Act, to requiring the production of papers or answers to questions relevant to the matter pending before the Commission. This, however, would probably be true, without any special provision of the Act to this effect, for it can hardly be sup-

posed that Congress intended that the power of the courts should be exerted to aid the Commission in reaching a determination which would be founded in part, at least, and possibly entirely upon irrelevant and consequently incompetent testimony, especially when it is considered that the courts, in a proceeding to enforce the Commission's order would have to give effect to the findings of the Commission, based as they would be upon improper evidence, and if these findings were contested might have to exclude the very evidence the production of which before the Commission they had enforced.

This court was required to consider this section of the Interstate Commerce Act, in the case of the Interstate Commerce Commission *vs.* Brimson, 154 U. S. Reports, page 447. There a proceeding had been instituted by the Commission to compel answers to certain questions which it had propounded to the witness, against whom the proceeding was brought, in an investigation which was being conducted by the Commission itself. The application of the Commission was resisted upon the ground that Congress had not the right to authorize the courts of the United States to take cognizance of such a proceeding, and upon the further ground that the question which the witness had declined to answer, related to matters which were not relevant or material to the subject matter of the investigation.

The Circuit Court, before which the Commission proceeded, dismissed the Commission's petition upon the first ground mentioned above; but upon appeal to this court, this judgment was reversed. In the opinion of the court, delivered by Mr. Justice Harlan, it is said (page 479):—

> "Suffice it in the present case to say that as the Interstate Commerce Commission, by a petition in the Circuit Court of the United States, seeks, upon grounds distinctly set forth, an order to compel appellees to answer particular questions and to produce certain books, papers, &c., in their possession, it was open to each of them to contend before that

court that he was protected by the Constitution from making answer to the questions propounded to him; or that he was not legally bound to produce the books, papers, &c., ordered to be produced; *or that neither the questions propounded nor the books, papers, &c., called for relate to the particular matter under investigation,* nor to any matter which the Commission is entitled, under the Constitution or laws to investigate. These issues being determined in their favor by the court below, the petition of the Commission could have been dismissed upon its merits;"

and the learned judge thus concludes his opinion (page 490):—

"In view of the conclusion reached upon the only question determined by the Circuit Court, what judgment shall be here entered? The case was heard below upon the petition of the Commission and the answers of the defendants. *But no ruling was made in respect to the materiality of the evidence sought to be obtained from the defendants.* Passing by every other question in the case, the Circuit Court, by its judgment, struck down so much of the twelfth section as authorized or required the courts to use their process in aid of inquiries before the Commission. Under the circumstances, we do not feel obliged to go further at this time than to adjudge, as we now do, that that section in the particular named is constistitutional, and to *remand the cause that the court below may proceed with it upon the merits of the questions presented by the petitions and the answers of the defendants, and make such determination thereof as may be consistent with law.*"

In the argument in the court below, an attempt was made to rest the right of the Commission to enforce the production of papers and answers to questions not relevant or material to the issues which it was trying, upon section 3 of the Act of Congress of February 19th, 1903,

entitled "An Act to further regulate Commerce." This section enacts as follows:—

> "And in proceedings under this Act and the Acts to regulate commerce, the courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction."

In the first place it will be observed that this section furnishes no support for the contention advanced, as it relates exclusively to the attendance of witnesses in proceedings pending in the Circuit Courts. But apart from this, it is apparent, it is submitted, that by the use of the words "directly or indirectly" Congress did not intend to abrogate the ordinary rules governing the admissibility of testimony in favor of parties to proceedings of the character contemplated in the section referred to. In fact, Congress promulgated no new rule of evidence by this section, for testimony may be relevant which relates only indirectly to the matter in issue.

That the relevancy of the evidence sought to be obtained was deemed by the Commission as inherent in the question of its right to maintain this proceeding appears from the petition filed by the Commission in the court below, wherein it is alleged "that the said questions are not only relevant and material to the issues on trial in said proceedings, but answers thereto are necessary, &c."

Were then the questions, which the witnesses in the present case declined to answer, and the papers which they declined to produce, material and relevant to the matters under investigation by the Commission?

The proceeding before the Interstate Commerce Commission had been instituted by one W. R. Hearst against certain Railroad Companies, to wit: Philadelphia and

Reading Railway Company; Lehigh Valley Railroad Company; Delaware, Lackawanna and Western Railroad Company; Central Railroad Company of New Jersey; New York, Susquehanna and Western Railroad Company; Erie Railroad Company; New York, Ontario and Western Railway Company; Delaware and Hudson Company; Pennsylvania Railroad Company; and Baltimore and Ohio Railroad Company.

The defendants had been called upon to answer and meet allegations affecting their methods of conducting business, which involved alleged illegal practices of the following nature:—

First.—Maintenance of unreasonable freight rates on anthracite coal to New York and other points.

Second.—Agreement and combination for the pooling of freights and freight traffic in anthracite coal.

Third.—Discrimination in rates in favor of certain Coal Companies, whose stock was owned by the Railroad Companies defendants.

As preliminary to any consideration of the relevancy of the evidence sought to be introduced, relating to the contracts and transactions of the Lehigh Valley Coal Company, to the issues raised or involved in the proceeding before the Commission, an understanding of the relations existing between that company and the Lehigh Valley Railroad Company is desirable. The Coal Company is an entirely distinct and separate legal entity, all of the stock of which is owned by the Railroad Company. This condition has existed since 1875, so that there was not much force in the suggestion made by Commissioner Prouty that this separate organization might perhaps be regarded as a device (and hence disregarded) to evade the effect of the Interstate Commerce Act, which became a law some twelve years later. This ownership of its stock by the Railroad Company is pursuant to express

authority conferred by the statutes of Pennsylvania. The policy of that State to encourage development of its mineral resources through mining companies controlled by transportation companies has been clearly recognized by its courts and full effect has been given to the legislation providing for such ownership. A striking instance of this is furnished by the decision of the Supreme Court of Pennsylvania in the case of Commonwealth *vs.* New York, Lake Erie & Western Railroad Company, 132 Penna. State Reports, page 591. In that case the Commonwealth of Pennsylvania had proceeded by *quo warranto* to escheat certain lands belonging to the Northwestern Mining and Exchange Company, upon the ground that as all the stock of that company was owned by the New York, Lake Erie and Western Railroad Company, the latter company was the real owner of the lands, and as such ownership was not authorized by the laws of Pennsylvania the lands were subject to escheat under an Act of the State of Pennsylvania, approved April 26th, 1855, providing that "No corporation * * * shall hereafter acquire and hold any real estate within this Commonwealth directly in the corporate name, or by or through any trustee or any device whatsoever, unless specially authorized to hold such property by the laws of this Commonwealth," and further providing for an escheat of lands held in violation thereof.

The Supreme Court held, however, that as the statutes of the State authorized the holding of the stock of the mining company by the New York, Lake Erie and Western Railroad Company, such holding could not be regarded as a device to evade the provisions of the Act of 1855. Upon this point the court said:—

> "The object of this legislation is obvious. It was to authorize railroad and canal companies to employ their capital and credit to aid in the development of the mineral resources of the Commonwealth. Such development, as every one knows, is in many instances beyond the reach of individual enterprise. It was easy enough to form corporations with all

the requisite powers for this purpose. It was a very different thing to find capitalists to take their stocks or bonds. Hence it was that the legislature gave to railroad and canal companies the power to purchase both stocks and bonds of such companies. Nor was any limitation placed upon this power. They might buy a portion or all of the stock. It probably never occurred to the legislative mind, while the purchase of a portion of the stock of a mining company, would be aiding such corporation to develop the mineral resources of the State, the purchase of a majority of or the whole of the stock of such company might he held to be a 'device' to evade the Act of 1855. However that may be, the Act of 1869 was evidently intended to legalize, and perhaps encourage, railroad and canal companies to invest in this species of mining companies. It involved, necessarily, the control of such companies by the corporations making such investments, to the extent of the stock held by them. A majority of the stock controls the corporation; the corporation controls the land held by it. In this sense, and to this extent, the Act of 1869 enabled railroad companies to control real estate, the title to which they were forbidden to hold directly or indirectly by the Act of 1855. It must not be forgotten, however, that controlling real estate, by means of the ownership of a majority of the stock of such corporation, is a very different matter from holding the title to such real estate. The one is legalized by the Act of 1869; the other is forbidden by the Act of 1855."

The Interstate Commerce Commission has itself recognized the conditions created by the policy of the State of Pennsylvania and the futility and impropriety of any attempt on its part to ignore these. Thus in the case of Coxe Brothers against the Lehigh Valley Railroad Company, 4 I. C. C. Reports, 535, in which the Commission had under consideration the reasonableness of

the freight rates on anthracite coal in force on this same Lehigh Valley Railroad, in referring to the relations existing between that company and the Lehigh Valley Coal Company, Mr. Commissioner Morrison delivering the opinion of the Commission, used this language:—

> "The legal right of the Lehigh Valley Railroad Company to take and hold the capital stock of the Lehigh Valley Coal Company, and the right of said coal company to mine, buy, ship, and sell coal is not raised in this proceeding, and if such right were raised and challenged, this Commission has no authority to determine it. While the coal company may, in the exercise of its chartered rights, buy and sell coal, certainly this Commission cannot determine the prices at which it may buy and sell, so that the railroad company may realize its established freight rates as carrier and suffer no loss as stockholder. The Commission would be incapable of any such determination if it had any authority to make it." * * *
>
> "Whatever opportunity for oppression and abuse may be afforded, or whatever possible injury might result to the public interest, from the corporate ownership and control or corporate relations existing between the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company, the authority of this Commission extends to such abuses only as are in conflict with the Act to regulate commerce or some of its provisions."

The decision of the Supreme Court of Pennsylvania, above referred to, should, it is submitted, be accepted as an authoritative declaration that ownership by railroad companies of the stock of coal companies, under the Act of 1869, cannot be treated or regarded as a device to enable the railroad companies to engage indirectly in the business for which the coal companies were organized and that consequently the acts of a Coal Com-

pany, the stock of which is held by a Railroad Company, cannot be regarded or treated as the acts of the Railroad Company.

We should hardly, however, be justified in further considering this feature of the case, for it is undoubtedly true, as stated by Judge Lacombe in dealing with the question of the relevancy of the contract which the appellee, Baird, had declined to produce, that: "Whether the Lehigh Valley Coal Company is to be considered as an independent corporation or whether in the transaction it is to be taken as the *alter ego* of the Railroad Company and the coal bought under the contract be treated as the coal of the Railroad Company, this particular contract is not relevant to the questions of reasonable rates, discrimination, &c., which were presented by the complaint."

This conclusion of the learned judge was, we submit, entirely correct.

The effect of these contracts was thus stated by Judge Lacombe, to whom a copy of one had been submitted:—

> "The contract, or at least one of the contracts asked for, has been produced and submitted to the court, and it does not provide, as indicated in the petition, that the 'prices paid to the seller are certain percentages of the prices for which the coal is sold at tidewater terminals.' It is entirely a contract of purchase, and does not deal at all with the subject of transportation. It fixes the price which the Lehigh Valley Coal Company is to pay the seller for coal at a certain percentage of the price at which coal of the same quality and sizes shall be sold during the month at a specified place. It is in no way different from a contract for the purchase of a specified number of tons of coal at a specified sum in dollars and cents; a contract made in the State of Pennsylvania, and to be completed therein by the delivery of coal at the breakers."

In this connection it should be observed that, while Judge Lacombe held that these contracts were irrele-

vant and declined to make an order for their production, he coupled with such refusal this declaration: "If, however, there are any contracts in the possession of the witness which deal with the subject of transportation, as well as with the subject of purchase, they should be produced."

The complainant was therefore in a position to demand and secure the production of any contracts dealing with the subject of transportation, but no such demand has been made by him.

The theory held by complainant's counsel as to the relevancy of these coal purchase contracts is thus stated in the affidavit accompanying his application for the issuance of a subpœna *duces tecum*:—

> "That the contracts called for are ostensibly contracts for the purchase of anthracite coal from mine owners or operators upon a basis of a percentage, stated therein, of the price realized on the sale of coal at tidewater and other points of distance, but that said contracts are in reality, as will appear when they are construed in the light of the evidence to be adduced, contracts fixing the rate of transportation of anthracite coal from the mines to its destination, said rates appearing therefrom to be entirely different from the published tariffs of any of said railroad companies. They constitute, therefore, important links in the chain of evidence by which the petitioner expects to prove unlawful discrimination of rates on the part of the respondent railroad companies."

In his argument before the Commission, as to their admissibility, he amplified his grounds and contended that they were admissible, because—

> (*a.*) While nominally contracts for the purchase of coal, they in reality were intended to fix the rate for the carriage of the coal covered by them, such rate being the difference between the amount real-

ized by the Coal Companies for the coal and the amount paid therefor.

(*b.*) They afford evidence of a monopoly.

(*c.*) They establish conditions which tend to support complainant's allegations that the Railroad Companies do not make rates in competition with one another, a condition which has some relevancy to the question whether their rates are reasonable.

Were these contracts admissible as evidence of the rates of freight paid by the Coal Companies?

It was not pretended that there was any evidence that these contracts had any other purpose than that disclosed upon their face, but counsel contended before the Commission, and his contention was apparently accepted, that the Commission would be justified in inferring that their purpose and effect were to fix the rate to be paid for the transportation of coal purchased thereunder; and, further, that such rate was to be the amount of profit realized by the Coal Company from the purchase and sale of the coal.

It is evident, of course, that this contention, even if sustainable, could not tend to establish the complainant's case, unless coupled with proof that this profit was less than the tariff rates established by the Railroad Company, for if the rate paid by the Coal Company was to be measured by its profit on the coal purchase contracts, certainly it was a necessary part of the complainant's case that he should establish that this profit was less than the tariff rates. This he not only entirely failed to do, but the evidence, which he himself adduced, affirmatively established that the Coal Company had paid full tariff rates on all its coal, and had, after charging the same against its purchased coal, realized a profit thereon.

Mr. Thomas (Record, page 619):—"The best answer to that is that the Lehigh Valley Coal Company, out of its sixty-five per cent. contracts, and putting it altogether, does not lose any money on its sixty-five per cent. contracts."

(The sixty-five per cent. contracts referred to are the so-called coal purchase contracts.)

MR. THOMAS (Record, page 629):—"The Lehigh Valley Coal Company pays the Lehigh Valley Railroad Company the full tariff."

The complainant insisted, however, that because it appeared that on a small proportion of the coal thus purchased, viz., prepared sizes marketed in New York, the Coal Company did not at all times realize on such sales enough profit to enable it to pay the tariff rates, and come out whole as to such coal, so segregated, that the Commission must find that the Coal Company had not paid the tariff on such coal, and consequently that the Railroad Company had carried the same at preferential and consequently discriminating rates of freight.

As it appeared from the evidence, that of the coal purchased by the Lehigh Valley Coal Company, only about ten per cent. came to New York (Thomas, Record, page 618), and as only a portion of this consisted of prepared sizes, and as it affirmatively appeared that, except at times when coal was selling at an unusually low figure, the Coal Company realized a profit even on this particular portion of its coal, more than sufficient to enable it to pay thereout the tariff rates of the Railroad Company, it will be seen how inadmissible is the theory advanced by complainant.

Complainant's offer was in effect to show that the Coal Company had on a portion of the coal (certainly less than five per cent.) purchased by it, realized as a profit less than the freight rates payable thereon.

Suppose the contracts had been produced and the Commission had found that, on a certain small percentage of the coal acquired thereunder, the profit had not been equal to the freight rates in force, could such finding possibly support a conclusion adverse to the Railroad Company's contention that it had received its tariff rates on all coal transported for the Coal Company? The conclusion would not have been justified, if there had been no other evidence for *non constat* that the purchases

as a whole were not profitable, or that, if they were not, the Coal Company had not been able, out of its other business (for the coal purchased under these contracts represented only a portion of the Coal Company's business), to make good its losses on purchased coal. But, as already stated, the evidence adduced by the complainant was direct and uncontradicted that the coal purchase contracts had proved profitable, and that the Lehigh Valley Coal Company had paid full tariff rates on all its shipments.

But apart from the fact that the contracts in connection with the evidence submitted by complainant, wholly fail to establish any preferential or discriminating rate of freight in favor of the Coal Company, it is most confidently submitted that they were wholly inadmissible as tending to prove anything whatever in connection with the rates paid by the Coal Company on coal purchased thereunder. Unless their legal effect was to limit the Coal Company's freights to its profits on the coal, they could not have the effect contended for by complainant. That no such effect can be imputed to them can be perhaps well illustrated by supposing that in an action brought by the Lehigh Valley Railroad Company against the Lehigh Valley Coal Company, to recover freights for coal carried, the latter company should set up that the coal so carried had been purchased under one of these contracts, and that the effect of the same was to relieve it from the obligation to pay tariff rates, if it could not sell its coal at a price to enable it to pay these, without making a loss on the transaction, and that the price realized on the particular coal carried had been insufficient for this purpose. It will be at once apparent how futile such a contention would be, and yet, unless the effect of the contracts would justify this position on the part of the Lehigh Valley Coal Company, in the case supposed, how can they be admitted in evidence for the purpose of sustaining a theory that the Lehigh Valley Coal Company, in case of coal purchased thereunder, pays the Railroad Company not the tariff rates, but the

difference between the amount it realizes for the coal and the amount which it is required, under the contract, to pay the operator from whom it is purchased. If there is any understanding or agreement between the Railroad and the Coal Company, that the Coal Company shall only pay this difference, that is, of course, another matter, but the contract itself wholly fails to establish this, and should not, therefore, be admitted in evidence for any such purpose.

If then the contracts did not tend to establish the rate of freight paid on coal purchased thereunder, it is clear that they were not admissible in evidence to prove the rate of freight paid by the Coal Companies on such coal, and hence had no relevancy or materiality whatever to the allegations of the complainant that the Railroad Company had exacted and received less on this coal than its published tariff rates.

The next ground upon which complainant's counsel rested his argument in favor of the admissibility of the contracts was that they tended to prove the existence of a monopoly. Even if this were their effect it afforded no reason for admitting them as evidence in the proceeding before the Commission, and this is true whether the monopoly thereby created was in the control of the coal or in its carriage. With neither of these conditions has the Interstate Commerce Commission power or authority to deal. And, indeed, this is the view of complainant's counsel himself, for in his opening address to the Commission he very frankly stated that he proposed to introduce evidence to prove monopoly or combination "so that this Commission shall have it in its power, if it deems it wise, to certify its findings to the Attorney General of the United States for such action as he deems proper to take."

The other ground urged was that the contracts were relevant as bearing upon the question whether the rates charged are competitive, and this to repel the possible presumption in favor of the reasonableness of rates established under normal or competitive conditions. Com-

plainant's theory probably being that if, for example, the coal purchased by the Lehigh Valley Coal Company was in the control of the operators, from whom the purchases were made, the carriage of a portion of this coal might be secured by some other carrier than the Lehigh Valley Railroad Company, and hence, these purchases tend to prevent competitive efforts on the part of the carriers to secure this traffic.

But if this question of the extent of control of the coal by the Coal Companies is a factor to be taken into account, in determining the reasonableness of the freight rates in force, the important and material fact would be to what extent was the coal so controlled, and not what were the terms and conditions upon which a certain portion of it was purchased? The contracts will not throw light upon the former question. All the witnesses interrogated upon the subject answered fully as to the fact and extent of these purchases. Thus, Mr. Thomas (Record, page 595) testified as follows:—

> "MR. SHEARN:—The coal—a large part of the coal of the Lehigh Valley Coal Company, as you have stated, is coal purchased? That coal is purchased under these sixty-five per cent. contracts?
>
> "MR. THOMAS:—I beg your pardon. I said that we purchased about two million three hundred thousand tons. I didn't say it was a large part.
>
> "MR. SHEARN:—I should not characterize it as 'large.' The amount you do purchase is purchased under the sixty-five per cent. contracts, is it not?
>
> "MR. THOMAS:—Yes, sir.
>
> "MR. SHEARN:—That is to say, the Lehigh Valley Coal Company buys coal to the extent that you have named, approximately, of independent miners, agreeing to pay them sixty-five per cent. of the prices realized at tidewater, on prepared sizes?
>
> "MR. THOMAS:—Yes, sir.

But apart from this consideration, is there any justification for the view that the absence of competition af-

fords some ground for an inference or presumption against the reasonableness of rates established by carriers. Rates are presumed to be reasonable, and this presumption cannot be overcome or even impaired, it is submitted, by proof, that the rates established are not forced or influenced by competition of other carriers. This is not the case of a carrier enjoying a monopoly of the carriage of goods or traffic of a certain kind to a particular market. Even in such a case, no inference against the reasonableness of the rate established could arise from such circumstance. But it is a case where there are a number of lines hauling coal in competition with one another, and the proposition advanced is that because certain coal mining companies, which ship respectively by one carrier exclusively, acquire by purchase certain coal in addition to that mined by them, this fact may be considered in determining whether the rates of the carrying companies are lawful. This proposition, it would seem, has but to be stated to demonstrate its unsoundness. Such fanciful and unsubstantial considerations should be given no weight in determining whether the carrier is charging more than is reasonable for the service to be performed. Other and substantial considerations should determine this.

Then, finally, the right to the production of the contracts was rested upon the contention that they established a "pooling" or division of the traffic in violation of section 5 of the Interstate Commerce Act.

It was, of course, not pretended that the contracts themselves provided for any pooling or division of freights. The theory seems to have been that because the coal companies would in all likelihood ship the coal purchased by them over and by the railroads owned or controlled by the railroad companies with which they were allied by stock ownership, the purchases of such coal resulted in a pooling of freights, in violation of the law upon the subject.

Even if we eliminate the coal company and treat the coal as purchased directly by the carrying company, no

such result could follow. Section 5 of the Interstate Commerce Act provides as follows:—

> "That it shall be unlawful for any common carrier, subject to the provisions of this Act, to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense."

This does not prohibit a purchase by a carrier subject to its terms of merchandise which it desires to secure the carriage of, and this is all that the coal companies, regarding them merely as the hands of the railroad companies, have done in the present case.

The questions relating to the methods pursued by the coal companies in the sale of their coal seem to be so wholly irrelevant to any matter before the Commission that it is difficult to even formulate an argument in favor of the admissibility of evidence of this sort, in order to combat it. In the discussion that took place before the Commission, no argument on this specific matter was advanced. The Commission having, on the admissibility of the coal-purchase contracts, ruled in favor of the right to investigate the business and actions of the coal companies, when the question of the relevancy of proof as to the methods pursued by these companies in selling their coal came under consideration, simply said that they regarded the question as already passed upon, and overruled the objections to the questions put to the witnesses. Assuming, for the sake of the argument, that the questions, if answered, would have disclosed an agreement or combination between the coal companies to regulate the prices and terms upon which they should sell their coal at tidewater at New York, how could this afford the slightest ground for the conclusion that the rates of the

carrying companies, which had transported the coal to that point, were unreasonable, or that this traffic was pooled by the carriers, or that a certain portion of it had been carried under discriminative charges. Even if the Coal Companies were eliminated, or regarded merely as "devices" of the Railroad Companies, and it had been made to appear that the latter were thus selling coal under a combination or agreement as to prices, how could it even be plausibly argued that proof that they had been proven guilty of an offense under the Sherman or so-called Anti-Trust law, was admissible in order to convict them of infractions of the interstate commerce law? Excepting upon some such theory, the relevancy of this evidence is not apparent.

FRANCIS I. GOWEN,
F. H. JANVIER,
JOHN G. JOHNSON,
For Eben B. Thomas and David G. Baird, Appellees.

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MAR 4 1904
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 409.

THE INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

WILLIAM H. TRUESDALE, FRED F. CHAMBERS, O. C. POST *et al.*,
Appellees.

Motion.

Now comes appellees William H. Truesdale, Fred F. Chambers and O. C. Post, by their counsel, and move the Court to dismiss the appeal in the above mentioned cause for want of jurisdiction, because the order from which the said appeal purports to have been taken was not entered in a suit in equity within the provisions and meaning of either of the Acts of February 11, 1903, or February 19, 1903.

Walter W. Ross

WALTER W. ROSS,
Counsel for Appellees William H. Truesdale, Fred F. Chambers, O. C. Post.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

INTERSTATE COMMERCE COMMISSION, Appellant, v. W. H. TRUESDALE *et al.*, Appellees.	No. 409.

Notice.

TO HON. P. C. KNOX, ATTORNEY-GENERAL OF THE UNITED STATES AND C. J. SHEARN, COUNSEL FOR APPELLANT.

Please take notice that on Monday, the 7th day of March, 1904, at the opening of Court, or as soon thereafter as counsel can be heard, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the said Court thereon. Annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

Walter W. Ross, WALTER W. ROSS,
Counsel for Appellees W. H. Truesdale,
F. F. Chambers, O. C. Post.